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No. 92-1956

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Betty Jo Christian
Counsel of Record
Charles G. Cole
David A. Price
STEPTOE & JOHNSON
1330 Connecticut Ave., NW
Washington, D.C. 20036
(202) 429-3000

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Pursuant to Rule 36.3 of the rules of this Court, the Washington Legal Foundation respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief; however, the respondents have refused to provide consent.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 members and supported nationwide. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability, by publishing monographs and similar educational materials on the

subject and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Burlington Northern Railroad Co. v. Ford*, 112 S. Ct. 2184 (1992); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1992).

WLF submits that the decisions below in this case are a radical departure from the common law on the liability for infliction of mental distress, especially in the workplace setting. If left intact, these decisions will impose significant costs upon businesses not only in the Federal Employers' Liability Act context, but also upon businesses in other areas as well. Such increased costs are ultimately borne by the consumers and workers as a whole. Any such change in employer liability in this area of the law is best left to Congress. WLF can thus bring a broader perspective to the issues in this case than that presented by the parties in this action.

For the foregoing reasons, movant WLF respectfully requests that it be allowed to participate in this case and file the annexed brief *amicus curiae* in support of petitioner.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Betty Jo Christian
Counsel of Record
Charles G. Cole
David A. Price
STEPTOE & JOHNSON
1330 Connecticut Ave., NW
Washington, D.C. 20036
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BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decisions below correctly noted that "[i]n deciding which injuries are compensable under the [Federal Employers' Liability Act], FELA jurisprudence 'gleans guidance from common-law developments.'" Pet. App. A-9, A-79 (quoting *Atchinson, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568 (1987)). Yet by permitting recoveries for mental anguish resulting from work-related stress, and not from any actual or threatened physical injury, the Third Circuit departed radically from the teachings of the common law.

At common law, there is simply no "tort" of negligent infliction of emotional distress. Common law courts do employ various tests for allowing or disallowing a claim based on negligent infliction of emotional distress, but these tests define an expanded rule of damages for conduct that is already understood to be tortious, rather than defining a distinct tort. There is no general duty to exercise reasonable care to avoid bringing stress upon another person. Only in cases of intentional infliction of emotional distress, involving extreme and outrageous conduct, does the common law hold a party liable absent conduct that is tortious on some other ground.

The common law doctrine has a sound policy basis. Mental distress is so unpredictable that liability for negligent infliction of emotional distress would be difficult for employers to guard against and expensive to insure. If any derogation from the common law doctrine is to occur with respect to workplace stress, however, the decision should be made by Congress, which can better set out balanced, tailored rules to govern employers or authorize an administrative agency to do so.

ARGUMENT

I. UNDER THE COMMON LAW, MENTAL DISTRESS ARISING FROM WORKPLACE STRESS IS NOT COMPENSABLE

In deciding claims of negligent infliction of emotional distress, the lower courts have virtually all followed one of three rules of liability. Classically, courts required an *actual* physical impact for recovery for mental distress, an approach that a minority of jurisdictions continue to use today. *See* William L. Prosser, John W. Wade & Victor E. Schwartz, *Cases and Materials on Torts* 396 (8th ed. 1988) (hereinafter "Prosser"); Richard N. Pearson, *Liability to Bystanders For Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 486-88 (1982). Under this rule,

liability for negligent infliction of emotional distress establishes no new category of tortious conduct; rather, it simply provides for an additional category of damages.

Second, a more widely-employed rule at common law is the "zone of danger" rule. That rule permits liability to be based on anguish suffered by a bystander when witnessing the injury of another person, where the bystander was himself or herself physically endangered (but not injured) by the accident. *See* American Law Institute, *Restatement (Second) of Torts* § 313(2) (1965) (hereinafter "*Restatement*"); *Gillman v. Burlington Northern R.R.*, 673 F. Supp. 913, 917 n.1 (N.D. Ill. 1987) (collecting authorities).

Third, the zone of danger rule is expanded in some jurisdictions to include a bystander who was not within the zone of danger, but who was a close relative of the victim. *See* Prosser, *supra*, at 407-08; *Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814 (1989) (in bank). This rule would permit liability where, for example, a mother has witnessed a car striking and injuring her child. Like the physical impact rule, neither the pure zone of danger rule nor the close relative rule establishes a new category of tortious conduct. Instead, they apply in cases involving conduct that was tortious with respect to the victim, and permit recovery by an additional category of claimants.

Finally, some jurisdictions permit a recovery for mental distress stemming from negligence in the rendering of certain services. *See*, *e.g.*, Joseph J. Kelleher, Note, *An Attorney's Liability For the Negligent Infliction of Emotional Distress*, 58 Fordham L. Rev. 1309, 1319-21 (1990) (legal malpractice); Prosser, *supra*, at 402 (negligence by telegraph company in transmitting a message announcing death; negligence in the handling of corpses).

In short, virtually all of the cases allowing a recovery for negligent infliction of emotional distress involved an

act that was independently tortious, such as a physical impact, injury to another individual, damage to property, or other tortiously negligent conduct. None of these common law rules establish a general duty to refrain from negligently inflicting emotional distress.

Rather, the common law imposes only a duty to refrain from *intentional* infliction of emotional distress. Even that cause of action is a comparatively recent development. "Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone." *Restatement*, *supra*, § 46 comment b.

Moreover, the cause of action for intentional infliction of emotional distress is further limited by a requirement of extreme and outrageous conduct by the defendant. *See Restatement*, *supra*, § 46(1); *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 568 n.16 (1987); *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1502 (1991). "It has not been enough that the defendant has acted with an intent which is tortious or even criminal . . . ." *Restatement*, *supra*, § 46 comment d.

These common law principles, however, were not applied by the court below. The cases under review involved neither intentional infliction of emotional distress nor one of the exceptions to the common law rule barring recovery for negligently caused mental stress. As discussed below, a rule permitting recovery for emotional distress caused by mere negligence, by removing the carefully drawn boundaries of the common law, would have severe detrimental effects.

II. THE DECISIONS BELOW WOULD RENDER EMPLOYERS' LIABILITY UNPREDICTABLE AND THEREFORE MORE DIFFICULT TO INSURE

Unlike the availability of mental distress damages for physical injuries or risks of physical injuries, which simply increase the amount of potential damages for a violation of the existing duty of care, the availability under FELA of a cause of action for negligent infliction of job stress would create new and unworkable rules of conduct for railroads. Moreover, the availability of such a cause of action under FELA could influence lower courts in non-FELA tort and workers' compensation cases to recognize the cause of action as well, with problematic results for employers and ultimately for consumers and employees. *See generally* George D. Bussey, *Mental "Stress" Claims and Workers' Compensation: The Problems and Suggestions for Change*, 43 Federation of Ins. & Corp. Counsel Q. 99 (1993); Peter S. Barth, *Workers' Compensation for Mental Stress Cases*, 8 Behavioral Sciences and the Law 349 (1990); Sara J. Sersland, *Mental Disability Caused By Mental Stress: Standards of Proof In Workers' Compensation Cases*, 33 Drake L. Rev. 751 (1983-84).

Workplace mental distress is far more difficult for an employer to predict and guard against than physical injury. The occurrence of physical injuries, which have a clear physical cause and effect, does not depend mainly on individual characteristics of the victim. The occurrence of emotional injuries, on the other hand, depends entirely on such characteristics. *See* Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages In the Absence of Physical Injury*, 1990 Ann. Surv. Am. Law 671, 672. "Where a workman loses a finger because of an errant piece of machinery, the ascertainable injury and the work-related cause are direct and simple. However, emotional distress may have multiple causes, some work-related, others not so related." *Archer v. Indus. Comm'n*, 619 P.2d 27 (Ariz.

Ct. App. 1980). A worker's "personal subjective vulnerability" determines his or her reaction to job stress. Sersland, *supra*, at 757. Moreover, "One can't know how an employee will cope with a stressful job without knowing the quality of his or her family relationships." *Stress and Distress*, Harv. Bus. Rev., July/Aug. 1993, at 9.

From the employer's point of view, the principal difficulty arising from the murky lines of causation in mental stress is not the *post hoc* problem of determining responsibility for it. While claims based on mental stress do present serious evidentiary difficulties, the real problem is that of predicting stress *before* the fact. Given the highly individual nature of responses to stress, an employer who is under a duty to exercise reasonable care to protect employees from job stress cannot do so except by cutting stress across the board -- a goal that could be achieved, if at all, only through revolutionary changes in the workplace. The fact is that a great many jobs, from restaurant kitchen work to heart surgery, from elementary school teaching to litigating, are inevitably stressful.

Nor is it any answer to say that the standard of care could be based on the expected responses of a "reasonable" employee rather than those of the actual employees; the problem lies precisely with the wide range of stress responses to be found in "reasonable" people. "Stress is an elusive phenomenon, determined by motivations and incentives. My stress may be your challenge." Derik R. Girdwood, Comment, *Can I Collect Workers' Compensation Benefits If My Job Drives Me Crazy?*, 1992 Detroit Coll. L. Rev. 591, 610 n.92 (quoting *Reading This May Cause You Stress*, Bus. Week, Oct. 14, 1985, at 170).

The unpredictability of mental distress, and of liability for mental distress under a negligence standard, has an important economic consequence: it will render liability insurance or workers' compensation insurance less available and more costly. Insurance requires that risks be statistically predictable over the long term. *See* Peter W.

Huber, *Liability: The Legal Revolution and Its Consequences* 136-37 (1988); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399, 404-09 (1987). But insurers simply have no means to make the predictions about mental distress that would be necessary to price an insurance product.

The result of higher insurance premiums would be to increase employment costs, and perhaps to reduce employment, in numerous blue collar and white collar fields. It is therefore unsurprising that state legislatures have been overturning or limiting judicial decisions in the workers' compensation context granting claims for negligent infliction of emotional distress. *See* Antonetti, *supra*, at 689; Bussey, *supra*, at 141 n.241.

In the absence of some form of physical impact, the approach of the common law to claims for mental stress has been to draw the line at those intentionally caused by outrageous conduct. This rule not only limits resort to the courts to the most egregious situations, but responds to many of the concerns raised by emotional distress claims. When there is evidence that the defendant acted with the intention of provoking emotional distress, it is at least clear that the *defendant* saw a potential causal relationship between his or her conduct and the plaintiff's reaction. There is also less cause to doubt the genuineness of the plaintiff's injury. Finally, the requirement of *outrageous* conduct demarcates behavior which, even if not precisely defined, should be easily recognized by every reasonable person.

Whereas claims for intentional infliction of emotional distress arguably seek to bring personal conflicts to court before they erupt into less civilized forms of resolution, claims for negligent creation of job-related stress would make litigable objections to the terms and conditions of employment. These are issues that are best addressed through other means, including discussions with supervisors, individual contract negotiations, grievance procedures and collective bargaining, and existing

legislation directed at the most serious abuses. Recognition of a cause of action for *negligent* infliction of emotional distress, when the common law had permitted only claims for outrageous, intentional conduct, would expand liability in ways that would be unpredictable, uninsurable, and unwise.

III. ANY DECISION TO RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER FELA SHOULD BE MADE, IF AT ALL, ONLY BY CONGRESS

The Third Circuit's decisions not only represent unsound policy, but also plunge the judicial branch into an area in which Congress is better equipped to act. Any regulation of stressful conditions in the workplace should proceed on an incremental basis and with careful adjustment between protection of employees and upheaval of workplace practices. Experience at both the state and federal level shows that these judgments are quintessentially legislative and can be handled through legislative action where appropriate.

In states where claims for workplace stress have been recognized at all, they have been recognized only in the context of a comprehensive scheme of workers' compensation, where the claim is narrowly defined and damages are specifically limited by law. Even so, a number of legislatures have amended their workers' compensation laws to overturn or limit judicial decisions that allowed claims for workplace stress. For example, the Massachusetts legislature overturned a decision that permitted claims based on distress arising from ordinary business operations such as personnel transfers. *See* Antonetti, *supra*, at 689-90. The Michigan legislature overturned a decision allowing claims where the employee merely believed that his or her mental injury resulted from job stress, regardless of whether it actually did. *Id.* at 692-93. Numerous other legislatures have also crafted restrictions on workplace stress claims. *Id.* at 695 &

n.217. This type of fine-tuning based on policy considerations is best accomplished through legislative action.

At the federal level, Congress has frequently enacted legislation to address specific sources of workplace stress. In doing so, Congress has had the opportunity to weigh the costs and benefits of regulating particular employment practices and has prescribed specific rules of conduct. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin; the Americans With Disabilities Act, 42 U.S.C. § 12112, prohibits discrimination on the basis of an employee's disability; the Age Discrimination in Employment Act, 29 U.S.C. §§ 623, 631, prohibits age discrimination against individuals between 40 and 70 years old; and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), prohibits discrimination based on an employee's pregnancy. Each of these statutes prohibits a type of conduct likely to produce emotional distress and provides a defined remedy.

Similarly, the Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993), entitles employees to take up to 12 weeks of unpaid leave in a 12-month period on account of childbirth, care of a close relative with a serious health condition, or the employee's own serious health condition. The Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, regulates workplace conditions bearing on employees' health and safety. The Fair Labor Standards Act, 29 U.S.C. §§ 207, 212, regulates, *inter alia*, overtime compensation and the use of child labor. These statutes, too, target sources of emotional distress in the workplace.

Moreover, unlike common law courts, a legislature that seeks to regulate workplace stress can delegate power to an administrative body with the ability to gather information and develop expertise concerning the practices it is to regulate. State workers' compensation programs

are administered by workers' compensation boards. *See, e.g.*, Girdwood, *supra*, at 598. The various federal statutes are likewise administered by Executive Branch agencies such as the Equal Employment Opportunity Commission, 29 U.S.C. § 633a(b), 42 U.S.C. §§ 2000e-4, 2000e-5, and the Department of Labor, 29 U.S.C. § 216.

Thus, judicial recognition of a general cause of action under FELA for negligent infliction of emotional distress would not only bypass the judgment of Congress as to which kinds of workplace stress should be compensated, but would also bypass the agencies in which Congress has vested responsibility for regulating workplace conditions.

IV. THE DECISIONS BELOW IMPROPERLY DISREGARDED COMMON LAW IN PERMITTING A RECOVERY FOR MENTAL DISTRESS ABSENT PHYSICAL INJURY OR DANGER OF PHYSICAL INJURY

This Court should adopt the overall common law position, consistent with its statement in *Buell*, by declining to impose a general duty to refrain from negligently inflicting emotional distress. Because *Carlisle* and *Gottshall* were decided incorrectly below under any of the common law rules, whether the physical impact rule, the zone of danger rule, or the variation allowing recovery by a close relative bystander, those decisions should be reversed regardless of the specific rule that this Court adopts.

In *Carlisle*, plaintiff complained of general work-related stress resulting from outdated equipment, long hours, and other factors. Pet. App. A-74-75, A-87. The Third Circuit, upholding "for the first time" a recovery based on "negligent infliction of emotional distress arising from work-related stress," declined to apply any of the common law rules circumscribing the availability of damages. Pet. App. A-89. Far from "glean[ing] guidance from common-law developments," the Third Circuit went

beyond even the most expansive of the mainstream common law rules. As discussed in part I, the difference is not simply one of degree: Unlike the availability of mental distress damages for physical injuries suffered by oneself or by another, which simply increases the amount of potential damages for a violation of an existing duty of care, the decision below creates a new and far-reaching primary rule of conduct.

In *Gottshall*, the plaintiff is clearly not entitled to recover under the physical impact rule, since he himself suffered no injury. Nor is he entitled to recover as a close relative bystander -- the Third Circuit's expansion of this concept to include close friends has no grounding in the common law.[1] However, under the zone of danger rule the analysis becomes more complex.

Most of the conduct cited by plaintiff as a basis for his claimed damages -- forcing plaintiff to work while his friend's body lay beside the track, working the men "even harder" the following day -- are plainly insufficient to justify imposing liability on the railroad. However, plaintiff also appears to rest his claim, at least to some extent, on the fact that he was working under the same conditions (excessive heat and humidity, insufficient breaks) that led to his friend's heart attack, and feared that he might suffer the same fate. On superficial examination, this might appear sufficient to bring plaintiff himself within the zone of danger, within the meaning of that test.

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[1] The court below failed to note that the "seminal case" among those it relied upon for its expansion of the bystander rule, *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), had been clarified in *Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814 (1989) (in bank), so as to preclude any such expansion. *See* Pet. App. A-10. Moreover, in rejecting familial status as a basis for determining bystander recovery, the court failed to note that bystander recovery for close relatives had itself begun life as an exception grafted onto the zone of danger rule. *See* Prosser, *supra*, at 407.

More rigorous analysis, however, clearly demonstrates that any such conclusion would be an unwarranted expansion of the zone of danger rule. To be meaningful, the concept of "danger" must consist of something more than normal working conditions. For any employee whose job involves heavy physical labor, performed outdoors, hot humid weather is simply a normal working condition in the summer months (as is cold, icy weather in the winter). And a fellow employee may suffer a heart attack, stroke, or other sudden severe illness in any circumstances. The emotional strain that stems from witnessing such an occurrence is analytically no different than the stress experienced by an office worker who is forced to continue work after seeing a co-worker at the next desk collapse from a heart attack -- and fears that the stress of the job could have a similar effect on him or her. Thus in *Gottshall*, as in *Carlisle*, the decision below was plainly improper and must be overturned.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Betty Jo Christian
Counsel of Record
Charles G. Cole
David A. Price
STEPTOE & JOHNSON
1330 Connecticut Ave., NW
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(202) 429-3000

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